

No. SC92927

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IN THE  
SUPREME COURT OF MISSOURI

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SHEENA EASTBURN,

*Appellant,*

vs.

STATE OF MISSOURI,

*Respondent.*

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APPELLANT'S REPLY BRIEF

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## **STATEMENT OF FACTS**

Respondent's brief is more remarkable for its omissions than its substance. In a single argument purporting to respond to Points I-III of appellant's brief, respondent has nothing to say regarding appellant's ineffective assistance of trial counsel claim advanced under Point III. (Resp. Br. at 14-29). Respondent's brief also does not address the merits of appellant's Eighth Amendment claim under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). (*Id.*). Respondent's brief also does not attempt to rebut appellant's arguments regarding the appropriate resentencing remedy in light of *Miller* under Missouri law. (*Id.*). Respondent also does not address appellant's contention that there is a categorical Eighth Amendment bar to the imposition of a sentence of life without parole upon a juvenile convicted as an accomplice. (*Id.*). Regarding the retroactivity of *Miller*, respondent relegates his discussion of this important question to a single footnote that merely notes, in passing, that there are conflicting decisions on this issue from other jurisdictions. (*Id.* 16, n.7).

Instead of addressing the merits of appellant's claims for post-conviction relief, respondent's brief takes a "shotgun" approach, advancing an array of procedural hurdles and misleading factual assertions in a pernicious attempt to delay a dispositive ruling from this State's highest court on the retroactivity of *Miller* and foreclose expeditious resentencing proceedings for the eighty-four

juveniles convicted of first degree murder that are currently serving life without parole sentences in Missouri's prisons. Most of respondent's procedural bar arguments were explicitly waived by the prosecutor before the motion court and were also implicitly rejected by the motion court in its final judgment. It is obvious that respondent's goal is to delay the inevitable resentencing in this case as long as possible in order to prevent Ms. Eastburn and other similarly-situated juveniles from promptly obtaining parolable sentences.

In support of this hodgepodge of procedural bar arguments, respondent also distorts the facts regarding the events that transpired before the motion court in the thirteen months between the filing of appellant's 2010 motion to reopen her first 29.15 proceeding and the first day of the evidentiary hearing that commenced on October 6, 2011. Therefore, appellant is compelled to set the record straight with the following additional facts to provide this Court with a complete understanding of the proceedings in the court below.

After appellant filed her motion to reopen, an initial pretrial conference was held before Judge Perigo on March 1, 2011. (L.F. 1). At this conference, which was unfortunately and inexplicably not transcribed by the court reporter, the undersigned counsel and McDonald County Prosecutor Jonathan Pierce reached an agreement to reopen the case and set the matter for an evidentiary hearing on the merits of appellant's claims for relief in the Summer of 2011. (Tr. 12-18).

Pursuant to this agreement, a proposed order was submitted to Judge Perigo, who signed it on the bench in the presence of undersigned counsel and Mr. Pierce. (*Id.* 17). This order read: “By agreement of the parties, movant’s motion to reopen her previous 29.15 proceeding is granted. The above-captioned case will be returned to an active docket for disposition.” (L.F. 25).

On May 19, 2011, the motion court scheduled an evidentiary hearing for August 3, 2011. (L.F.1). Prior to this hearing, the undersigned counsel and Mr. Pierce worked out a negotiated disposition of the case. (Tr. 13-14). The parties agreed to stipulate that appellant be granted post-conviction relief and that her conviction and sentence for the offense of murder in the first degree be set aside. Thereafter, appellant would plead guilty to the lesser included offense of second degree murder in exchange for a thirty year sentence.

It was the intention of both parties to execute this agreement on August 3, 2011. Undersigned counsel filed an application for a writ of habeas corpus ad testificandum to obtain appellant’s presence on that date to dispose of the case. (L.F. 1). On August 3, 2011, Ms. Eastburn, the undersigned counsel, and Mr. Pierce appeared before Judge Perigo and informed him of this agreement to dispose of the case. At that time, Judge Perigo asked Mr. Pierce if he had complied with the Missouri Victim Rights Law by informing Tim Eastburn’s family of this agreement. See § 595.209 R.S.Mo. (2010). After Mr. Pierce

indicated to the court that he had not, the court continued the case until October 6, 2011 and a writ of habeas corpus was issued on August 23, 2011 to secure appellant's presence in order to dispose of the case at this subsequent setting. (L.F. 2).

On September 2, 2011, Mr. Pierce filed a motion to dismiss appellant's reopened 29.15 proceeding, alleging that the trial court did not have subject matter jurisdiction to reopen the case six months earlier and that appellant was not abandoned by prior post-conviction counsel. (*Id.*, Tr. 12-18). After being "blindsided" by this motion, the undersigned counsel contacted Mr. Pierce by phone to obtain an explanation regarding why the state reneged on the aforementioned agreement to dispose of the case. During this phone conversation, Mr. Pierce indicated to the undersigned counsel that he decided he could not go through with the negotiated disposition of the case because Tim Eastburn's sister objected to appellant receiving a parolable sentence.

It was under this factual backdrop that the legal arguments were advanced by both parties regarding the prosecution's belated motion to dismiss prior to the commencement of the evidentiary hearing of October 6, 2011. (Tr. 4-18). The undersigned counsel did not learn that the two prior pretrial conferences were not on the record until October 6, 2011. (*Id.* 16). However, Mr. Pierce did concede that there was "an agreement to reopen [the] 29.15 proceedings." (*Id.* 12). Despite

this agreement, Mr. Pierce contended that the motion court lacked subject matter jurisdiction to hear the case because jurisdictional issues cannot be waived. (*Id.* 12-13).

Judge Perigo agreed to proceed with an evidentiary hearing on the merits of appellant's claims for relief and took the issue of subject matter jurisdiction under advisement. (*Id.* 14-18). In his final judgment, Judge Perigo did not address the prosecution's abandonment and subject matter jurisdiction arguments. (L.F. 26-27; 33-34). The court below also did not issue any ruling on the state's motion to dismiss. (*Id.*). The motion court also issued a specific finding that the parties agreed to reopen appellant's first 29.15 motion. (*Id.*).

## **REPLY ARGUMENT**

### **I.**

#### ***MILLER V. ALABAMA IS RETROACTIVE***

By failing to address the critical issue of the retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) to cases on collateral review, the state has tacitly conceded that *Miller* is retroactive. It is well settled that a party concedes an issue by failing to address it in an opposing brief. *See, e.g., Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1267 (D.C. Cir. 1996); *Figueroa v. United States Postal Service*, 422 F.Supp.2d 866, 879 (N.D. Oh. 2006).

In similar post-conviction litigation contexts, both this Court and courts of other jurisdictions have held that the state's failure to respond to factual or legal arguments raised by a prisoner in support of post-conviction relief constitutes a concession as to those issues. *Curtis v. Tozer*, 374 S.W.2d 557, 566 (Mo. App. E.D. 1964); *Label v. Sullivan*, 165 S.W.2d 639, 641 (Mo. banc 1942). Therefore, the state's failure to address appellant's argument that *Miller* is fully retroactive should be considered a concession on the merits of that question. *See Polk v. State*, 233 P.3d 357, 359-361 (Nev. 2010). As another court has pointed out in similar circumstances, the state's failure to address the merits of a prisoner's claims indicates "a lack of regard for the gravity of the matters before [the] court...a litigant who fails to stress a point by supporting it with pertinent authority or by showing why it is a good point despite a lack of authority...forfeits the point." *Carpenter v. Vaughn*, 888 F.Supp 635, 647-648 (M.D. Pa. 1994).

As appellant pointed out in her opening brief, the Supreme Court has already answered the question of the retroactivity of *Miller* by granting relief in the companion case of Arkansas prisoner Kuntrell Jackson. Jackson's conviction, like appellant's conviction in this case, became final long before the *Miller* decision issued. 132 S. Ct. at 2261. Had *Miller* not applied retroactively to cases on collateral review, Mr. Jackson would have been precluded the relief he was granted. "Once a new rule is applied to the defendant in the case announcing the

rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.” *Teague v. Lane*, 489 U.S. 288, 300 (1989). Thus, if a new rule is announced and applied to the defendant on collateral review, as the court did in *Miller*, that rule is necessarily retroactive. *Tyler v. Cain*, 533 U.S. 656, 663 (2001).

It should also be noted that the retroactivity of *Miller* was apparent even to the dissenting Justices in that case. The dissenting opinion of Justice Roberts indicated that the *Miller* decision would invalidate more than two thousand sentences. *Miller*, 132 S. Ct. at 2480 (Roberts, J. dissenting).

It is also clear that *Miller* is retroactive because, in reaching the conclusion that the Eighth Amendment bars mandatory life without parole sentences for juvenile homicide defendants, the court in *Miller* relied on several prior Eighth Amendment decisions that are fully retroactive. The court in *Miller* rested its holding on its prior decisions in *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Sumner v. Shuman*, 483 U.S. 66 (1987). *Miller*, 132 S. Ct. at 2463-2465. Each of these prior decisions cited in *Miller* were subsequently found to be retroactive. *See, e.g., Loggins v. Thomas*, 654 F.3d 1204, 1206 (11th Cir. 2011); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011); *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985); *Thigpen v. Thigpen*, 926 F.2d 1003, 1005 (11th Cir. 1991). Because these precursors to the *Miller* decision were fully retroactive, it

necessarily follows that *Miller* is also retroactive. *See Tyler v. Cain*, 533 U.S. at 668-669 (O'Connor, J. concurring) ("If we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review.")

Other courts have recognized that *Miller* is retroactive in light of the grant of relief to Kuntrell Jackson, because Jackson's case came before the Supreme Court from the denial of a state habeas petition. *See, e.g., Hill v. Snyder*, 2013 WL 365198 at \*2, n.2 (E.D. Mich. Jan. 30, 2013). In a series of decisions, Illinois appellate courts have consistently held that *Miller* is retroactive under the *Teague* test. *People v. Williams*, 982 N.E.2d 181, 197 (Ill. App. 2012); *People v. Cooks*, 2013 WL 1195435 (Ill. App. March 22, 2013); *see also People v. Morfin*, \_\_\_N.E.2d \_\_\_, 2012 WL 6028634 at \*9-10 (Ill. App. Nov. 30, 2012) (holding *Miller* is retroactive under *Teague* because it made a substantial change in substantive Eighth Amendment law and qualifies as a "watershed" rule of criminal procedure).

Since *Miller* is retroactive under the test articulated in *Teague* for determining the retroactivity of new rules of constitutional law in federal habeas corpus cases, it is not a close question that *Miller* is also retroactive under the more lenient retroactivity rule that this Court adopted in *State v. Whitfield*, 107 S.W.3d

253 (Mo. banc 2003). In *Whitfield*, this Court adopted the following three-part test articulated by the United States Supreme Court in the 1960's in the *Linkletter* and *Stovall* cases<sup>1</sup> in determining whether a new constitutional rule is applied retroactively: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 266. All three of these factors gravitate in favor of the retroactivity of the *Miller* decision.

Under the first factor, the purpose of *Miller* was to prohibit juveniles from receiving mandatory sentences of life without parole by requiring individualized sentencing hearings to allow a judge or jury to consider the defendant's youth and other mitigating circumstances. *See Hill v. Snyder, supra*. 2013 WL 364198 at \*2, n.2. An important consideration in the weight to be given to this purpose is "[t]he extent to which a condemned practice infects the integrity of the truth-determining process." *Stovall v. Denno*, 388 U.S. 293, 298 (1967). The new rule announced in *Miller* is clearly more substantive and fundamental to a fair and accurate sentencing process than the rule in *Ring v. Arizona*, 536 U.S. 584 (2002) that this Court found to be retroactively applicable in *Whitfield*. Mandatory life without

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<sup>1</sup> *Linkletter v. Walker*, 381 U.S. 618 (1965); *Stovall v. Denno*, 388 U.S. 293 (1967).

parole sentencing schemes create a substantial risk that a juvenile “will receive a life without parole sentence for which he or she lacks the moral culpability.” *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010).

Under the second *Whitfield* factor, there is no conceivable argument that could be made on behalf of the state that the extent of reliance by law enforcement on the viability of mandatory juvenile life without parole sentences is substantial. Unlike previous new rules expanding the exclusionary rule, a constitutional rule affecting sentencing proceedings for juvenile homicide defendants has no conceivable adverse impact on police investigative practices. *See Stovall*, 388 U.S. at 298-301 (finding *United States v. Wade*, 388 U.S. 218 (1967) is not retroactive because of substantial burden placed on police because, prior to *Wade*, the constitution did not require counsel at pretrial lineups); *see also Johnson v. New Jersey*, 384 U.S. 719, 727 (1966) (Because of detrimental reliance by law enforcement on prior decisions, *Miranda v. Arizona*, 384 U.S. 436 (1966) is not retroactive).

The *Miller* decision is based on the Eighth Amendment premise that “evolving standards of decency that mark the progress of a maturing society” now prohibit mandatorily sentencing a juvenile to die in prison. *Miller*, 132 S. Ct. 2463. In the context of an Eighth Amendment claim of this nature, any adverse impact upon law enforcement is minimal and is obviously outweighed by the

necessity of ensuring that criminal punishments for juveniles comport with evolving standards of decency.

Finally, the retroactive application of the *Miller* decision would not have a significant adverse impact on the administration of justice in Missouri. The *Miller* decision will not invalidate any convictions. *Miller* only requires the affected inmates to have a meaningful and individualized sentencing proceeding. In addition, only eighty-four cases out of the more than twelve hundred Missouri prisoners sentenced to life without parole will be affected by the *Miller* decision. *See People v. Williams*, 982 N.E.2d at 198 (finding that one hundred and five cases affected by *Miller* in Illinois would not unreasonably burden the state or the courts). In addition, given the admonition by the *Miller* majority that life without parole sentences for juveniles will be rare, it is highly unlikely that there will be adversarial resentencing proceedings in very many of these cases. After this Court determines the appropriate resentencing remedy for *Miller* violations,<sup>2</sup> it is likely that in most of these cases the state will concede that the defendant is entitled a parolable sentence.

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<sup>2</sup> The interests of finality would also be promoted by adopting appellant's proposed remedy of ordering resentencing on the lesser offense of second degree murder because there would be no grounds for any future appeals.

## II.

### **THERE IS NO PROCEDURAL IMPEDIMENT TO THIS COURT'S REVIEW OF APPELLANT'S CONSTITUTIONAL CLAIMS**

As noted earlier, on March 1, 2011, the prosecution and appellant reached an agreement and stipulation that appellant's motion to reopen her first 29.15 motion on grounds of abandonment of counsel and to correct a manifest injustice should be granted. As a result, the motion court issued an order reopening the case "by agreement of the parties." (L.F. 25). Approximately six months later, McDonald County Prosecutor Jonathan Pierce changed his mind, due to political pressure from the victim's family, and filed a motion to dismiss appellant's 29.15 motion alleging that the court below lacked subject matter jurisdiction to reopen the case. (L.F. 2, Tr. 4-18). By explicitly conceding and not contesting the issues of abandonment and jurisdiction in this prior court proceeding, the state's change of tactics is precluded by judicial estoppel and waiver of affirmative defense principles that are applicable to post-conviction proceedings.

The doctrine of judicial estoppel is grounded upon fundamental principles of justice that it is unfair to allow a party to a lawsuit to change his position in a later stage in the same proceeding in order to gain an unfair advantage. *Davis v. Wakelee*, 156 U.S. 680, 691 (1895). The Supreme Court more recently described this legal doctrine in the following terms: "[W]here a party assumes a certain

position in a legal proceeding, ..., he may not thereafter, simply because his interests changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” *Zedner v. United States*, 547 U.S. 489, 504 (2006).

Reviewing courts usually consider three factors in deciding whether to apply the judicial estoppel doctrine in a particular case. First, a party’s later position must be clearly inconsistent with its earlier position. Second, the party must have succeeded in persuading a court to accept that party’s earlier position. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001). Based upon the record in this case, all three of these factors are present here. It is clear that by belatedly reviving procedural defenses to reopening the case the State took a position that is inconsistent with its March 1, 2011 agreement to reopen the case. Second, as noted earlier, the motion court accepted the State’s earlier position. Finally, there can be no dispute that appellant was and is prejudiced by the State’s inconsistent positions.

The doctrine of judicial estoppel has also been adopted by the courts in the State of Missouri. *See, e.g., Dick v. Children’s Mercy Hosp.*, 140 S.W.3d 131, 141 n.5 (Mo. App. W.D. 2004) (noting that judicial estoppel is often invoked to

prohibit parties from deliberately changing positions according to the exigencies of the moment and that the circumstances under which judicial estoppel may be appropriately invoked are probably not reducible to any general formulation of principle). In Missouri, the doctrine of judicial estoppel “embodies the notions of common sense and fair play.” *Egan v. Craig*, 967 S.W.2d 120, 126 (Mo. App. E.D. 1998). Judicial estoppel also was designed to “prevent parties from playing fast and loose with the court.” *See In the Matter of the Contest of the Primary Election Candidacy of Michael Fletcher*, 337 S.W.3d 137, 145 (Mo. App. W.D. 2011). Thus, the State is clearly estopped from arguing in this appeal that there are procedural impediments to the review of the merits of appellant’s claims in light of the state’s March 1, 2011 agreement to reopen the case.

In addition, respondent’s tactical flip-flop in arguing inconsistent positions before the motion court is precluded by the waiver of affirmative defense rules that apply to civil litigants across the board. Rule 29.15(a) provides that post-conviction motions should be governed by rules of civil procedure “insofar as applicable.” By conceding that this matter should be reopened, the state affirmatively and explicitly waived any procedural defense to merits review of appellant’s underlying constitutional claims. *See Royster v. Royster*, 420 S.W.2d. 1, 3 (Mo. App. W.D. 1967). Therefore, the state’s arguments regarding abandonment, timeliness, and other procedural impediments were waived. *See*

*Price v. State*, \_\_\_ S.W.3d \_\_\_, 2012 WL 6725611 at \*5 and n.9 (Mo. App. S.D. 2012).

The waiver/judicial estoppel issue here is similar to the facts this Court confronted in *State ex rel. York v. Daugherty*, 969 S.W.2d 223 (Mo. banc 1998). In *York*, this Court held that parties in domestic cases who relied on judgments signed by a commissioner that were subsequently ruled unconstitutional were estopped from belatedly attacking these judgments because the litigants previously accepted the benefits and burdens of those judgments. *Id.* at 225.

One year later, this Court reached a similar conclusion in *State ex rel. Department of Social Services v. Houston*, 989 S.W.2d 950 (Mo. banc 1999). In *Houston*, the court held that the respondent was estopped from challenging the constitutional validity of a child support order because of the other party's reasonable reliance upon its legitimacy. *Id.* at 952-953. This Court in *Houston* also held that the respondent had waived his right to challenge this prior court order because he waited fifteen months after it was entered to do so. Thus, respondent waived his right to challenge the legitimacy of this child support order on constitutional grounds by not doing so at the earliest possible opportunity. *Id.* at 951-952.

As in *York* and *Houston*, waiver and judicial estoppel principles preclude the state here from agreeing to reopen the case on abandonment and manifest injustice

grounds and then, six months later, changing its position to appellant's detriment. Judicial estoppel precludes a litigant obtaining a court ruling and then, a few months later, seeking to have it overturned because the litigant changed his mind in order to gain a tactical advantage in the same or related litigation. *See In re Expungement Arrest Records Related to Brown v. Missouri Highway Patrol*, 226 S.W.3d 147, 151 (Mo. banc 2007).

Finally, because the agreement to reopen the case was a stipulation regarding a threshold procedural issue, settled caselaw prohibits the state from backing out of this agreement because stipulations must be consistently enforced in the absence of any claim of fraud, duress, or mistake. *Akers v. City of Oak Grove*, 246 S.W.3d 916, 922 (Mo. banc 2008). There is no doubt that the March 1, 2011 agreement to reopen is a binding stipulation, as Judge Perigo suggested prior to the October 6, 2011 hearing. (Tr. 5). "A stipulation is an agreement between counsel with respect to business before the court and, although not a usual pleading, is a proceeding in the cause and so under the supervision of the court...The purpose of a stipulation is to eliminate the litigation of an issue so as to save delay, trouble and expense." *Smith v. Smith*, 985 S.W.2d 836, 841-842 (Mo. App. W.D. 1998), quoting *Ezenwa v. Director of Revenue*, 791 S.W.2d 854, 859 (Mo. App. W.D. 1990).

In this case, the parties stipulated and agreed to reopen this case to address the merits of appellant's substantive claims for post-conviction relief. Where a stipulation occurred in good faith, it is binding and must be enforced. *Akers*, 246 S.W.3d at 922. Respondent's brief cites no authority that precludes the prosecution from affirmatively waiving any procedural defense or agreeing to a grant of prisoner's motion to reopen his or her first Rule 29.15 proceeding without the necessity of a hearing. All of the authorities cited by respondent involve distinct situations, usually involving the state's failure to file a responsive pleading or otherwise object to a procedural irregularity regarding a pro se or amended 29.15 motion. *See, e.g., Rowher v. State*, 791 S.W.2d 741 (Mo. App. W.D. 1990). This affirmative waiver by the state in this case is a "horse of a different color."

The state has advanced no compelling reason to exempt the State of Missouri from complying with the settled waiver, estoppel, and stipulation jurisprudence that is binding upon all other civil litigants. Indeed, a compelling argument can be made that it is even more important, in the interests of justice and fair play, for the state to follow these rules in a post-conviction action where a citizen's life and liberty is at stake. *See* Rule 4-3.8; *Berger v. United States*, 295 U.S. 78, 88 (1935) (Prosecutors are obliged to see that defendants are "accorded procedural justice" and may not utilize "improper methods" to win a case.)

The state's belated procedural arguments in this case represent the epitome of the legal system's misplaced emphasis upon form over substance. Far too often in the post-conviction process, concern for efficiency and procedure has overshadowed concern for basic fairness and has transformed our fidelity to process into an undue obsession with formalism and technicalities. This obsession for procedure has far too often obscured or eclipsed the equally important, and undoubtedly greater role, to be played by a dedication to justice. Since the state has not bothered to respond to the merits of Sheena Eastburn's constitutional claims attacking her conviction and sentence, this Court should not be swayed by the state's obstructionist tactics, calculated to postpone the resolution of the important issues presented in this appeal. "Justice delayed, is justice denied." Suzy Platt (ed.). Entry 954. William Ewart Gladstone (1809–98). *Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service*. Library of Congress, 1989.

### **CONCLUSION**

For the foregoing reasons, as well as those reasons advanced in appellant's opening brief, the judgment of the motion court should be reversed and the case remanded for resentencing on the lesser included offense of second degree murder.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,277 words, excluding the cover, table of contents, table of authorities, jurisdictional statement, this certification and the appendix, as determined by WordPerfect X4 software; and,
2. That on the 19th day of April, 2013 I electronically filed Appellant's Reply Brief using the CM/ECF system which sent notification of such filing to all counsel of record.

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